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In the Supreme Court of the United States

OCTOBER TERM, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in construing the requirement of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. 902(f)(2), that "criteria" applied to certain claims adjudicated by the Secretary of Labor "not be more restrictive" than criteria set forth in rules applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, and in thereby ruling that the Department of Labor must not only apply *medical* criteria no more restrictive than those applied by HEW, but must also apply the evidentiary rules and adjudicatory standards applied by HEW.

II

PARTIES TO THE PROCEEDING

In addition to the Director, Office of Workers' Compensation Programs, the Benefits Review Board, United States Department of Labor, was a named respondent in the court of appeals. In addition to Charlie Broyles, Lisa Kay Colley was a petitioner in the court of appeals.

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v.

CHARLIE BROYLES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 824 F.2d 327. The decisions of the Benefits Review Board (App., *infra*, 7a-9a (*Broyles*) and App., *infra*, 18a-21a (*Colley*)) are unreported, as are the decisions of the administrative law judges (App., *infra*, 10a-17a (*Broyles*) and App., *infra*, 22a-28a (*Colley*)).

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1987. A rehearing petition was denied on September 30, 1987 (App., *infra*, 29a-30a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—
>
> **(A)** in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;
>
> **(B)** such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;
>
> **(C)** such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and
>
> **(D)** the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish

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> criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).
>
> (2) Criteria applied by the Secretary of Labor in the case of—
>
> (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;
>
> (B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and
>
> (C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;
>
> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

STATEMENT

1. *Statutory and regulatory framework.* The Black Lung Benefits Act, 30 U.S.C. (& Supp. III) 901 *et seq.*, provides benefits to coal miners (and eligible survivors) who suffer from pneumoconiosis[1] that arose out of coal

[1] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal dust and asbestos. Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 727.202) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct.

mine employment, causing total disability or death. 30 U.S.C. 901(a), 922(a), 932(c); *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, No. 86-327 (Dec. 14, 1987), slip op. 5. Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973, under "Part B" of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid by the federal government. 30 U.S.C. 922(a), 924. Claims filed after that date, and adjudicated under "Part C" of the Act, are considered by the Department of Labor. 30 U.S.C. (& Supp. III) 925, 932. Individual coal mine operators bear primary responsibility for paying Part C benefits (30 U.S.C. 932(b)), although in certain cases Part C benefits are paid from the Black Lung Disability Trust Fund, which is financed by the coal mining industry and administered by the Director of the Office of Workers' Compensation Programs. See 30 U.S.C. 932(j), 934; 26 U.S.C. 4121(a), 9501.

a. A miner is totally disabled under the Act when he is unable to perform work comparable to that he did as a coal miner. 30 U.S.C. 902(f)(1)(A). Prior to the 1977 amendments, the Black Lung Benefits Act authorized HEW to establish the regulatory standards for determining when a coal miner's pneumoconiosis would be deemed to be totally disabling. See 30 U.S.C. (1976 ed.) 902(f). In 1972, HEW promulgated "permanent" regulations—intended to be applicable to all claims filed into the indefinite future—that set certain medical standards for determining when a miner's respiratory impairment is considered totally disabling. Under HEW's permanent regulations, to establish total disability a miner had to show through ventilatory studies (also known as pulmonary function tests) that the volume of air his lungs could expel was less than certain values (20 C.F.R. 410.426(b)), or show an impairment of the blood's ability to carry oxygen

or certain heart abnormalities (20 C.F.R. 410.424 & Subpt. D, App.).[2]

In 1972, HEW also promulgated a special interim regulation applicable only to claims filed by miners on or before June 30, 1973, or by survivors of miners who died before January 1, 1974 (Part B claims). The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate disability due to pneumoconiosis. 20 C.F.R. 410.490(a). It provided an "interim presumption" of total disability for Part B claimants who showed a respiratory impairment, measured by ventilatory studies, that is substantially less severe than is required under HEW's permanent regulations. Compare 20 C.F.R. 410.490(b)(1)(ii) with 410.426(b). This rebuttable presumption was only available to miners who had worked at least ten years in coal mines. 20 C.F.R. 410.490(b)(1)(ii) and (3).[3]

HEW's interim regulation also provided a rebuttable presumption that a claimant was totally disabled if X-ray, biopsy, or autopsy evidence established the existence of pneumoconiosis and the impairment was caused by coal

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[2] HEW's permanent regulations also incorporated the Act's requirement that a claimant would be considered totally disabled if other types of medical evidence showed that he could no longer perform the type of work he did as a coal miner (20 C.F.R. 410.412, 410.426(a), (c) and (d)), as well as a statutory irrebuttable presumption of total disability (30 U.S.C. 921(c)(3)) where X-ray evidence showed severe damage to the lung (20 C.F.R 410.418).

[3] HEW's interim regulation is unclear, in one part requiring 15 years of coal mine employment (20 C.F.R. 410.490(b)(1)(ii)), but later apparently requiring only ten years of coal mine employment (20 C.F.R. 410.490(b)(3)), to establish the interim presumption of total disability based on ventilatory studies. Courts have not resolved the ambiguity.

mine employment. 20 C.F.R. 410.490(b)(1)(i) and (2). First, if a miner worked for ten years in a coal mine his pneumoconiosis was presumed to arise from his coal mine employment. Second, in any other case the claimant "must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines." 20 C.F.R. 410.416, 410.456.[4] As a result, a miner who worked for less than ten years in a coal mine could establish a presumption of total disability under HEW's interim regulation by showing the existence of pneumoconiosis by means of an X-ray and presenting evidence supporting the claim that coal mine work caused the pneumoconiosis.

b. Congress amended the Act in 1977, shifting to the Secretary of Labor—for claims filed after December 31, 1973 (Part C claims)—the authority to issue regulations defining "total disability" and to "establish criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners * * *." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95; 30 U.S.C. 902(f)(1)(D). Congress also directed the Secretary to reopen claims that had been denied prior to the effective date of the 1977 amendments (30 U.S.C. 945) and provided that, in adjudicating those claims, along with others filed before the Secretary's final regulations were promulgated,[5] the "[c]riteria applied by the Secretary of Labor * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973," *i.e.*,

[4] While the regulation did not specifically address how a miner with less then ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant may establish causation by showing that his pneumoconiosis was unlikely to have been caused by exposure to lung irritants other than coal mine dust.

[5] Final regulations, 20 C.F.R. Pt. 718, were proposed in 1978 and became effective on April 1, 1980.

to a claim adjudicated under HEW's interim Part B regulation. 30 U.S.C. 902(f)(2).

The Secretary promulgated interim regulations in 1978 to govern the cases Congress ordered reopened and those filed before the effective promulgation of the permanent regulations. They include a presumption of total disability (20 C.F.R. 727.203) that is similar but not identical to HEW's interim regulation. Labor's interim presumption regulation is more generous to claimants in certain ways. Specifically, unlike HEW's interim regulation, it provides that, in addition to X-rays and ventilatory studies satisfying medical criteria identical to those found in HEW's interim regulation, the presumption of total disability could be established by blood-gas studies, other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). At the same time, however, Labor's interim presumption regulation allowed the presumption of total disability based on X-ray, biopsy, or autopsy evidence of pneumoconiosis to be established only if a claimant worked in coal mines for at least ten years. 20 C.F.R. 727.203(a)(1). Thus, a claimant presenting an X-ray showing pneumoconiosis could not, as under HEW's interim regulation, gain the benefit of the presumption of total disability if he worked in coal mines for less than ten years by relying on other evidence to show causation. In that event, he could not trigger the presumption at all.[6]

[6] HEW's interim regulation states that the presumption of total disability—whether invoked through X-ray, autopsy, or biopsy evidence, or through ventilatory studies—can be rebutted by "evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or by other evidence, "including physical performance tests * * * establish[ing] that the individual is able to do his usual mine work or comparable and gainful work." 20 C.F.R. 410.490(c). Labor's interim presumption regulation

2. *Proceedings below.* Charlie Broyles and Bill Colley filed claims for black lung benefits before Labor's final regulation took effect in 1980. Both submitted X-rays showing the presence of pneumoconiosis. Because neither had worked in coal mines for ten years, neither could invoke the presumption of total disability under Labor's interim regulation.

With respect to Broyles, an administrative law judge determined that he had worked for five years as a coal miner from 1946 to 1952, after which he worked over 20 years at other occupations involving exposure to dust (App., *infra*, 11a-12a). Although which occupation had caused Broyles' pneumoconiosis was not clear, the administrative law judge gave Broyles "the benefit of the doubt" and concluded that coal mining had caused it (*id.* at 16a). The administrative law judge assumed that Broyles, who retired in 1976 following coronary bypass surgery (*id.* at 14a-15a), was totally disabled. However, relying on physicians' reports, the administrative law judge denied Broyles' claim because his disability was not due to pneumoconiosis, but instead was caused by his heart condition (*id.* at 16a). The Benefits Review Board affirmed (*id.* at 7a-9a).

Another administrative law judge determined that Bill Colley, who had arthritis, chronic bronchitis, and had suffered a stroke in 1978 (App., *infra*, 26a, 27a), had worked in coal mines for no more than nine and a half years between 1945 and 1962 (*id.* at 24a-25a). The administrative law judge found it "questionable" whether the X-ray Colley had submitted showed that he had pneumoconiosis (*id.* at 25a). But the administrative law judge apparently

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provided that the presumption could be rebutted in those ways (20 C.F.R. 727.203(b)(1) and (2)) or by evidence establishing that the miner's total disability did not arise from coal mine employment or that the miner did not have pneumoconiosis (20 C.F.R. 727.203(b)(3) and (4)).

assumed that Colley had pneumoconiosis and concluded, based on physicians' reports, that Colley "has not shown that his respiratory or pulmonary condition is causally related to his prior coal mine employment" (*id.* at 28a). The Benefits Review Board affirmed (*id.* at 18a-21a).

The court of appeals consolidated the two cases.[7] It reversed on the ground that in each case the administrative law judge "erred in failing to evaluate the claims under [HEW's interim regulation], 20 C.F.R. § 410.490" (App., *infra*, 2a). Relying on *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983), and *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), the court concluded that Labor's interim presumption regulation is contrary to Section 402(f)(2)'s directive that the Secretary apply "criteria" that are not more restrictive than the criteria applied by HEW in its interim regulation. The court found Labor's regulations inconsistent with the statute because, under HEW's interim presumption regulation, a claimant who submitted an X-ray showing pneumoconiosis could invoke the presumption of total disability even if he had worked in coal mines for fewer than ten years, whereas, under Labor's interim regulation, the presumption could not be invoked by claimants, such as Broyles and Colley, who worked in coal mines for fewer than ten years. The court rejected the Secretary's argument that Congress intended in Section 402(f)(2) that the Department of Labor should apply *medical* criteria no more restrictive than those applied by HEW until Labor's permanent regulations were in place, but that Congress did not intend to require Labor to apply the same evidentiary standards and adjudicatory rules as applied by HEW. App., *infra*, 5a. The court remanded for reevaluation of the claims (*id.* at 6a).

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[7] Lisa Kay Colley was substituted as claimant for her father, who died prior to the court of appeals' decision.

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the question whether the Secretary of Labor's interim presumption regulation is contrary to Congress's directive in Section 402(f)(2) that the "criteria" applied to Part C claims filed before the final regulations took effect be "not * * * more restrictive than the criteria applicable to a claim" considered under HEW's interim regulation (30 U.S.C. 902(f)(2)). This conflict has serious practical implications, since the issue may be presented in as many as 3,600 pending cases and may require the reopening of as many as 94,000 cases. Moreover, the conclusion that the regulations are inconsistent with the statute is wrong. In these circumstances, plenary review by the Court is warranted.

1. Five circuits have considered whether the Secretary of Labor's interim regulation conflicts with Congress's directive in Section 402(f)(2). The first court to do so was the Third Circuit. It concluded in *Halon* that the Secretary's interim regulation contained more restrictive "criteria" than HEW's interim regulation, contrary to Section 402(f)(2), because Labor's interim presumption could not be established by a miner presenting an X-ray showing pneumoconiosis who had worked in coal mines for fewer than ten years. Judge Weis dissented in *Halon*. He agreed with the Department that the "criteria" referred to in Section 402(f)(2) were *medical* criteria and that Congress did not intend to require the Secretary to apply the same evidentiary rules and adjudicatory standards applicable under HEW's interim regulation. Since the medical criteria in Labor's interim regulation were identical to those in HEW's interim regulation in some respects and more generous to claimants in other respects, he found the regulation consistent with the statute (713 F.2d at 30).

The Eighth Circuit followed *Halon* in *Coughlan*. Subsequently, in *Sebben* v. *Brock*, 815 F.2d 475 (1987), petitions for a writ of cert. pending, Nos. 87-821 & 87-827, that court held that the Secretary must reopen claims denied under Labor's interim regulation and reconsider them under HEW's interim regulation.

The Seventh Circuit, in *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 400 (1987), expressly rejected the holdings in *Halon* and *Coughlan*. The court found the meaning of "criteria" as used in Section 402(f)(2) ambiguous, noting that the final sentence of the preceding subsection refers to " 'criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners' " (817 F.2d at 401 (citation omitted)). Given the ambiguity, the court examined the legislative history to the provision, and concluded, as Judge Weis had concluded in dissent in *Halon*, that the Department's interpretation is consistent with the intent of Congress (817 F.2d at 402-404). Subsequently, the Sixth Circuit in *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 144 (1987), petition for a writ of cert. pending, held in a divided opinion that Labor's regulations are inconsistent with the statute, as did the court below.

The direct conflict between the Seventh Circuit's decision in *Strike* and the decisions of the other courts of appeals has serious practical implications, even though Labor's permanent regulations became effective in 1980. Claims filed before the permanent regulations took effect are to be adjudicated under the interim regulation, and nearly 9,600 of those claims are pending. The Department of Labor reviewed its summary data on black lung benefits claims and it estimates that approximately 3,600 pending claims filed before the final regulations took effect involve claimants with fewer than ten years of coal mine employ-

ment. The conflict in the circuits affects those claimants with fewer than ten years of coal mine employment who submitted X-ray, biopsy, or autopsy evidence of pneumoconiosis.

Further, the need to reopen many more decisions pursuant to the Eighth Circuit's decision in *Sebben* will be eliminated if it is decided that Labor's interim regulations are consistent with Section 402(f)(2). As noted in our petition in *Sebben* (at 10-12),[8] approximately 94,000 claims that were denied under Labor's interim regulation involved claimants who worked in coal mines for fewer than ten years, and each of those claims (most of which were finally decided more than five years ago) may have to be reopened. That massive effort is unnecessary if this Court concludes that the Eighth Circuit, along with the court below and the Third and Sixth Circuits, erred in its conclusion that Labor's interim presumption regulation is inconsistent with Section 402(f)(2).

2. The court below erred in concluding that Labor's interim presumption regulation conflicts with Section 402(f)(2). As an initial matter, the only thing plain about the language of Section 402(f)(2) is that its meaning is unclear. The Sixth Circuit in *Kyle*, which held that Labor's interim regulation is contrary to the statute, nevertheless conceded that "[m]anifestly, the term 'criteria' is subject to numerous possible interpretations" (819 F.2d at 142); see also *Strike*, 817 F.2d at 401 ("the plain meaning of the statute is ambiguous"). That is correct. "Criteria" means "a standard on which a judgment or decision may be based" (*Webster's New Collegiate Dictionary* 267 (1979)). Its meaning varies according to what is to be judged or decided, and that may in turn be illuminated from the context in which the term is used.

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[8] We are serving a copy of our petition in *Sebben* and a copy of our petition in *Kyle* on the parties to this case.

The purpose of Section 402(f) is to define the nature of the "total disability" that is necessary to qualify for benefits under the Act. See 30 U.S.C. 901(a). Section 402(f) states that a miner "shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in" coal mining or similar employment. 30 U.S.C. 902(f)(1)(A). While this ultimate standard was not in dispute when the statute was amended in 1977, there was substantial controversy at that time about the appropriate medical criteria for determining whether total disability should be found. See pages 13-16, *infra*. The controversy was resolved by providing, in Section 402(f)(1)(D), that the Secretary of Labor "shall establish criteria for all appropriate medical tests * * * which accurately reflect total disability" as defined in Section 402(f)(1)(A). Section 402(f)(2) follows immediately after Section 402(f)(1)(D), and provides that the "[c]riteria applied by the Secretary" of Labor to reopened cases and those filed prior to the effective date of permanent regulations "shall not be more restrictive than the criteria" applied by the Secretary of HEW to cases filed on or before June 30, 1973. In view of the context, the Secretary of Labor reasonably concluded that "criteria" in Section 402(f)(2) is shorthand for the phrase used in the preceding sentence, "criteria for all medical tests."

Review of the legislative history of the 1977 amendments confirms that the Secretary's reading is correct. Section 402(f)(2) originated in the House bill. That bill would have provided that the regulations governing the "total disability" determination for all Part C claims (not just claims filed before Labor's final regulations took effect) "shall not provide more restrictive criteria than those applicable" to a Part B claim decided under HEW's interim regulation. H.R. Rep. 95-151, 95th Cong., 1st Sess. 52 (1977). The House Report explained that "[t]he so-called 'permanent' *medical* standards now in effect under Part C

are much more demanding than the so-called 'interim' standards applied by HEW under Part B of the program. * * * This provision of the bill would require that standards no more restrictive than the 'interim' *medical* standards shall be equally applicable to Part C claims." *Id.* at 15 (emphasis added). The Report was apparently referring to the ventilatory study scores applied to Part C claims under HEW's permanent regulations, which were much stricter than the scores applied to Part B claims under HEW's interim regulation (compare 20 C.F.R. 410.426(b) with 410.490(b)(1)(ii)); the House intended to mandate the continued use of the ventilatory study scores applied under HEW's interim regulations. In contrast, the House Report did not suggest that it intended to mandate the continued use of any evidentiary rules or adjudicatory standards.[9]

Like the House, the Senate focused on the fact that HEW's interim ventilatory study scores "are far less stringent" than the scores in its permanent regulation. S. Rep. 95-209, 95th Cong., 1st Sess. 13 (1977). However, it ultimately determined not to require continued application of HEW's interim medical criteria. The Senate Report noted HEW's assertions "that the interim standards do not accurately determine actual disability, that they were used under Part B only to clear away the backlog of claims arising from the 1972 amendments, and that the permanent standards more accurately identify disabling respiratory

[9] Of particular relevance to the requirement of ten years coal mining experience as a prerequisite to triggering the presumption, the summary of medical knowledge on coal workers' pneumoconiosis appended to the House Report concluded that there was broad agreement that "[t]he probability that coal miners will develop black lung increases regularly after about ten years of working underground." H.R. Rep. 95-151, *supra*, at 30. In view of that recognition by Congress, it would be surprising if Congress simultaneously acted to mandate the use of a presumption of total disability for miners with fewer than ten years' experience.

and pulmonary functions in coal miners" (*ibid.*). The Report also noted that the United Mine Workers considered even HEW's interim ventilatory study scores too stringent (*ibid.*). The Senate concluded that it was "not qualified to assess the appropriateness of medical test standards to be used to determine disability in coal miners" (*ibid.*). The bill it passed gave the Secretary of Labor authority to define the term "total disability" without reference to previously applied criteria (*id.* at 34-35).

The Conference Committee adopted the Senate's version of Section 402(f) "with the proviso that the so-called 'interim' part B *medical* standards are to be applied to all reviewed and pending claims filed before the date the Secretary of Labor promulgates new *medical* standards for part C cases." H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978) (emphasis added). The version of Section 402(f) passed by the Senate became Section 402(f)(1) and the House version was modified and became Section 402(f)(2). Thus, Section 402(f)(1) directed the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, to "establish criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners" (30 U.S.C. 902(f)(1)(D)). It authorized the Department of Labor to devise new ventilatory study scores (which it has done, see 20 C.F.R. Pt. 718, App. B ("Standards for Administration and Interpretation of Pulmonary Function Tests")) and other medical standards as well, which it has also done (see 20 C.F.R. Pt. 718, App. A ("Standards for Administration and Interpretation of Chest Roentgenographs") and App. C ("Blood-Gas Tables")). Section 402(f)(2) directed the Secretary of Labor to use the "criteria" in HEW's interim regulation until the new permanent regulations took effect. Because the discussions in the committee reports of both versions of Section 402(f) focused on the difference

between the ventilatory study scores in HEW's permanent and interim regulations, and the Conference Report spoke of medical standards, it is clear that the "criteria" referred to are medical standards.

There is no evidence in the language of the statute or its legislative history indicating concern with evidentiary rules or adjudicatory standards. As the Seventh Circuit noted in *Strike* (817 F.2d at 403-404 (emphasis added)): "The only reference to the use of presumptions in the conference report stated that '[t]he conferees also intend that *all* standards are to incorporate the presumptions contained in section 411(c) of the Act [30 U.S.C. § 921(c)].' H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 * * *. That section creates a rebuttable presumption that pneumoconiosis arose out of coal mine employment '[i]f a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines.' 30 U.S.C. § 921(c)(1)." It is precisely that requirement of ten years coal mining experience that was "expressly incorporate[d]" (817 F.2d at 404) into the Secretary of Labor's interim regulation at issue in this case. Accordingly, the regulation is consistent with the statute.

Furthermore, as the court in *Strike* stated (817 F.2d at 404), "the members of the House Committee on Education and Labor, who were responsible for originally drafting the 'not more restrictive' language, reviewed and commented on the Secretary of Labor's proposed Part C interim regulations * * * [and] none were critical of the fact that the regulation required proof of at least ten years of coal mine employment" to establish the presumption of total disability. Accordingly, it seems clear that the Secretary of Labor correctly construed Section 402(f)(2) in promulgating the interim regulation at 20 C.F.R.

727.203.[10] At the least, the Secretary's interpretation of

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[10] The court of appeals' decision appears to be wrong for another reason not directly presented in this case. The court stated that "the only way to rebut this presumption is to show that the claimant is either doing or is capable of doing his usual coal mine work" (App., *infra*, 3a). Thus, the court appears to have concluded that the Secretary of Labor's interim regulation is invalid for the added reason that it authorizes two rebuttal methods not enumerated in HEW's interim regulation (see note 6, *supra*). Whether the regulation is invalid on that ground is pending in the Eighth Circuit in *Consolidation Coal Co.* v. *Smith*, No. 86-2397 (argued Oct. 16, 1987). The Sixth Circuit, while holding in *Kyle* that Labor's interim regulation is contrary to Section 402(f)(2) because it does not allow claimants with fewer than ten years of coal mine work to invoke the presumption of total disability, also suggested that Labor's interim regulation is not inconsistent with the statute insofar as it authorizes additional rebuttal methods. 819 F.2d at 144; see also *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.3d 485, 490 (6th Cir. 1985).

It is less than clear that HEW's interim regulation is properly understood as barring rebuttal of the presumption by disproving pneumoconiosis or coal mining causation. Assuming that is the correct reading, however, the provisions of Labor's interim presumption regulation establishing that a claimant's total disability "did not arise in whole or in part out of coal mine employment" or that a claimant "does not, or did not, have pneumoconiosis" (20 C.F.R. 727.203(b)(3) and (4)), are plainly valid. It is clear that Congress intended to permit such rebuttal evidence, since the purpose of the Act is to provide benefits to a coal miner only "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment" (*Mullins Coal Co.*, slip op. 5). In light of the statutory purpose, a rule that coal mine operators could not present evidence that a claimant did not have pneumoconiosis or that a claimant's disability was not caused by coal mine employment would violate the statutory requirement that "all relevant evidence" be considered. 30 U.S.C. 923(b). It would also appear to be irrational and therefore suspect on due process grounds. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 34-37 (1975) (construing Section 411(c)(4), 30 U.S.C. 921(c)(4)) not to limit the evidence a coal mine operator may present on rebuttal, thus avoiding a constitutional challenge). It is, for this additional reason, sensible to construe the reference to "criteria" in Section 402(f)(2) as encompassing medical standards, but not proof burdens or evidentiary rules.

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the ambiguous term "criteria" to refer to the medical standards in HEW's interim regulation, but not its evidentiary rules and adjudicatory standards, is a reasonable interpretation that warrants deference. See, *e.g.*, *NLRB* v. *United Food Workers Local 23*, No. 86-594 (Dec. 14, 1987), slip op. 10; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CAROL A. DE DEO
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

DECEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1091

CHARLIE BROYLES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, OF THE UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

No. 86-3153

LISA KAY COLLEY, PETITIONER

v.

BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR, DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, RESPONDENTS

On Petition for Review of an Order of the Benefits Review Board

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Argued June 2, 1987

Decided July 31, 1987

Before: CHAPMAN, Circuit Judge, and BRITT and MACKENZIE, U.S. District Judges, sitting by designation.

CHAPMAN, Circuit Judge:

The appellants before us are Charlie Broyles and Lisa Colley, who has been substituted to pursue the claim originally filed by her father, the late Bill Colley. Appellants in these two consolidated cases seek review of decisions by the Benefits Review Board (BRB) affirming denials of their claims for disability benefits pursuant to the Black Lung Benefits Act, 30 U.S.C.A. § 901 *et seq.* (1986). The BRB concluded that the denial determinations, which had been issued by an Administrative Law Judge (ALJ) after hearings, were supported by substantial evidence and contained no prejudicial errors of law. Each appellant contends that the ALJ erred in failing to evaluate the claims under 20 C.F.R. § 410.490. We agree and reverse the BRB's decisions in both cases and remand them for further proceedings.

I

A miner is entitled to disability benefits under the Black Lung Benefits Act if he is totally disabled by pneumoconiosis arising out of his coal mine employment. *See* 30 U.S.C. § 901(a) and 902(b) (1986). Congress and the various agencies responsible for administering the benefits program have recognized that the existence and causes of pneumoconiosis are difficult to determine, and have over the years established a number of evidentiary presumptions to assist miners in proving their claims. Regulations creating presumptions to establish the elements of a claim for benefits have been promulgated in accordance with the legislative mandate to give the benefit of the doubt to claimants. *Southard v. Director, OWCP*, 732 F.2d 66, 71 (6th Cir. 1984). Congress has repeatedly amended the acts to ensure the liberal award of benefits and to rectify what it perceived as a persistent administrative practice of undue strictness in the award of

benefits. *Director v. Bethlehem Mines Corp.*, 669 F.2d 187, 190 (4th Cir. 1982).

The "interim presumption" at 20 C.F.R. § 410.490 was promulgated by the Secretary of Health, Education and Welfare in response to the Congressional directive that he loosen the eligibility requirements for benefits and facilitate prompt processing of claims. *Tally v. Mathews*, 550 F.2d 911, 916 (4th Cir. 1977). When promulgated, however, 20 C.F.R. § 410.490 by its terms applied only to claims filed by living miners before July 1, 1973 or by their survivors before July 1, 1974. 20 C.F.R. § 410.490(b).

The interim presumption available under 20 C.F.R. § 410.490 is clearly the least restrictive presumption which has ever been available to a black lung claimant. This interim presumption can be established through an x-ray read as showing pneumoconiosis and a showing that the disability arose out of coal mine employment. The only way to rebut this presumption is to show that the claimant is either doing or capable of doing his usual coal mine work. 20 C.F.R. § 410.490. This regulation provides a standard which is easily met. A somewhat similar interim presumption is provided under 20 C.F.R. § 727.203, however, it requires that the miner in question have ten years of coal mine employment.

In contrast, all claims filed after January 1, 1974, *see* 30 U.S.C. § 931 (1986), were initially adjudicated under more restrictive criteria. These claims were administered by the Secretary of Labor. Initially, no regulations were promulgated to govern the entitlement benefits. Instead, the Secretary of Labor adjudicated these claims under the "permanent" regulations located at 20 C.F.R. §§ 410.401-410.476.

Thus, the Secretary of Labor was adjudicating claims only under the more restrictive permanent regulations at the same time that the Secretary of Health, Education and Welfare was applying the far more lenient interim

presumption available at 20 C.F.R. § 410.490 to claims filed before the magic date of July 1, 1973. Congress, perceiving the inequity, enacted the 1978 amendments to the Act in an effort to make the proof of claims more uniform. *Director v. Bethlehem Mines Corp.*, 669 F.2d at 190.

The 1978 amendments added 30 U.S.C. § 902(f)(1)(b), which directed the Secretary of Labor to create new "permanent" criteria governing eligibility requirements. Most significantly for the purposes of this appeal, the 1978 amendments provided at 30 U.S.C. § 902(f)(2):

> Criteria to be applied by the Secretary of Labor in the case of–
>
> * * *
>
> (C) any claim filed on or before the effective date of [the new, "permanent"] regulations promulgated under this subsection [i.e., under 30 U.S.C. 902(F)(1)(D)] by the Secretary of Labor . . . *shall not be more restrictive* than the criteria applicable to a claim filed on *June 30, 1973*, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor. (Emphasis added)

Mr. Broyles initially filed his claim on September 17, 1976. Mr. Colley filed his claim on September 18, 1974. The Secretary of Labor did not effectively promulgate the new "permanent" regulations, located at 20 C.F.R. Part 718, until April 1, 1980. In each appellant's case, the ALJ found that because the claimant did not satisfy the requirement that he have been employed in the coal mines for at least 10 years, he was not entitled to the interim presumption available at 20 C.F.R. § 727.203 and his claims had to be evaluated under the more restrictive regulations found at 20 C.F.R. §§ 410.401-410.476. The

appellants argue that the interim presumption available under § 410.490 should have been applied to their claims.

In light of Congress' clear mandate in 30 U.S.C.A. § 902(f)(2) we agree with appellants' position and reverse the decision of the BRB. It is difficult to imagine that Congress picked the date of June 30, 1973, the last day under which the interim presumption would be available under 20 C.F.R. § 410.490, out of a hat. It is far more likely that Congress intended that the liberal interim presumption available under 20 C.F.R. § 410.490 be applied to all claims filed before such time while the Secretary of Labor promulgated the new "permanent" regulations at 20 C.F.R. Part 718. This holding is similar to that made in two other circuits. *See Halon v. Director, OWCP*, 713 F.2d 21 (3rd Cir. 1983); *Coughlan v. Director, OWCP*, 757 F.2d 966 (8th Cir. 1985).

The Department of Labor contends that 30 U.S.C. § 902(f)(2) should be read to indicate that the Secretary of Labor may not apply "*medical* criteria" more restrictive than those that applied to claims pending on June 30, 1973. The Department contends that 20 C.F.R. § 727.203(a), a regulation promulgated by the Secretary of Labor, creates a presumption of total disability using "*medical* criteria" identical to those available in 20 C.F.R. § 410.490 and thus satisfies the requirements of 30 U.S.C. § 902(f)(2) despite the fact that it conditions the interim presumption on proof by the miner of 10 years of coal mine employment. This argument is not persuasive. The only support the Department offers is ambiguous bits of legislative history which do not support its contention that the word "criteria" in 30 U.S.C. § 902(f)(2) should be read as "medical criteria". *See Halon* and *Coughlan*.

Both appellants alleged that the administrative decisions at issue contained other errors of law. Although we have considered these arguments, we have found no other prejudicial errors of law. It should be noted, however, that if

on remand the 20 C.F.R. § 410.490 presumption is found applicable, certain conflicts in the evidence may require reevaluation, in view of the shift in the burden of proof.

Based upon the foregoing, we reverse the decisions of the BRB on these claims, and remand the claims for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DEPARTMENT OF LABOR

BRB No. 84-232 BLA
OWCP No. 235-28-1500

CHARLIE BROYLES, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

[Filed Feb. 27, 1986]

DECISION AND ORDER

Appeal of the Decision and Order of V. M. McElroy, Administrative Law Judge, United States Department of Labor.

Margaret F. Woulfe (Chadwell & Kayser Ltd.), Chicago, Illinois, for the claimant.

Michael J. Denney (Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and WHITE, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. §921(b)(5) (West Supp. 1985).

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-8613) of Administrative Law Judge V. M. McElroy denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that claimant established 5 years of coal mine employment, and the existence of pneumoconiosis arising out of coal mine employment, but failed to establish total disability due to pneumoconiosis.

In reviewing the administrative law judge's Decision and Order, the Board's role is limited. If the findings of fact and conclusion of law are supported by substantial evidence, are not irrational, and are consistent with applicable law, the decision must be affirmed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This claim was filed in 1976, and therefore, the administrative law judge properly considered it under 20 C.F.R. Part 410 of the regulations. *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). Further, because this claim arises in the Fourth Circuit, the administrative law judge properly found that 20 C.F.R. §410.490 is not applicable to the instant claim. *Reilly v. Director, OWCP*, 7 BLR 1-139 (1984). Last, the administrative law judge properly concluded that the claimant's blood gas studies failed to meet the Appendix table values, and do not establish total disability pursuant to 20 C.F.R. §410.424(a).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/s/ JAMES F. BROWN
James F. Brown
Administrative Appeals Judge

/s/ NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

/s/ ARTHUR C. WHITE
Arthur C. White
Administrative Law Judge

Dated this 27th
day of February 1986

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR

Case No. 81-BLA-8613
OWCP No. 235-28-1500

CHARLIE BROYLES, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

MARGARET F. WOULFE, ESQUIRE
Chadwell & Kayser,
Chicago, IL
For the Claimant

KEVIN KOPLIN, ESQUIRE
Office of the Solicitor
U.S. Department of Labor
Chicago, IL
For the Director

Issued: Dec. 19, 1983

Before: V. M. McELROY, Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* In accordance with the Act and the regulations promulgated thereunder, the claim was referred for hearing to the Office of Administrative Law Judges of the U.S. Department of Labor by the Director, Office of Workers' Compensation Programs ("OWCP").

A hearing was held in Chicago, IL, at which time both parties presented evidence and argument, as provided for in the Act and the regulations issued thereunder. Director's Exhibits ("DX") 1-37 and Claimant's Exhibits ("CX") 1-3 were received into evidence at the hearing. The Claimant was hospitalized for treatment of pneumonia at the time of the hearing and was, therefore, unable to testify at the hearing. Subsequent to the hearing the Claimant's deposition was taken, at which the Director's counsel was present. The Claimant's deposition and brief have been received by this Office, and the record is now closed.

FINDINGS OF FACT

1. *The Claimant's Employment*

The Claimant's first employment was apparently as a farm laborer in 1942. Later he became a mechanic in the U.S. Army from 1942-1945. After he left the service, the Claimant worked as a coal miner from 1946 until 1952[1] approximately five years total (DX 1,2,4; CX 2). From 1952-1957 he worked as a[n] auto mechanic and much of his time was spent re-lining brakes of automobiles. From 1952-1958 the Claimant operated a filling station. In 1958-1959 he loaded trucks with 20# boxes of plastic toys. From 1959 until June of 1975 when he retired, the Claimant worked for the Crane Packing Company, first as a lapmaster operator and then as a lead man. His duties required him to pour an abrasive dust, apparently some sort of carborundum material, into these machines. This abrasive material was then used to "lap" or polish the parts

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[1] (The Claimant's social security records found in DX 3 are not considered because they are for the wrong social security number. CX 3 contains the correct earnings record of the Claimant).

placed into the lapmaster machine. The Claimant testified that he was exposed to little or no dust in his employment as a[n] automobile mechanic, lapmaster operator and lead man. The Claimant's testimony is not entitled to weight regarding the level of dust exposure in his other than coal mine employment. Both the automobile mechanic and lapmaster operator positions by their nature involved some dust exposure.

2. *The Responsible Operator*

As all of the Claimant's coal mine employment antedated 1 January 1970, the Director, OWCP will provide for the payment of any benefits which may be due to the Claimant from the Black Lung Disability Trust Fund (20 CFR 725.490; 725.492).

3. *The Claimant's Dependent*

The Claimant has one dependent for purpose[s] of augmentation of benefits under the Act, his wife, with whom he is living (T4; DX6).

4. *The Claimant's Medical History*

a. *The X-ray Readings*

The earliest X-ray of record was taken on 9 February 1977. The first reading of this film bears a date of 9 May 1977. Dr. John S. Fitzpatrick interpreted the film as evidencing simple pneumoconiosis, Type p, profusion 1/1 in all zones of the Claimant's lungs and Type v, profusion 0/1 in the upper zone of the Claimant's right lung. Inactive tuberculosis was also noted (DX 17). This film was reread by one G. Jackson on 13 June 1977 as 0/0 for pneumoconiosis. Emphysema and inactive tuberculosis were noted (DX 14). The next film was taken on 11 March 1980. Dr. Fitzpatrick, who on this reading noted that he is a Board-certified radiologist, interpreted the film as

evidencing pneumoconiosis Type p, profusion 1/1 in all zones of the Claimant's lungs and Type s, profusion 0/1 in the lower zones of both the Claimant's lungs. Emphysema was suspected and it was noted that the Claimant was under a physician's care for treatment of active tuberculosis (DX 16). A film of the same date was reread by Dr. Charles D. Smith, a Board-certified radiologist and NIOSH certified "B" reader as 0/0 for pneum[o]coniosis on 9 April 1980 (DX-15). This rereading is not considered because the wrong social security number appears on the report. The latest film was taken on 1 July 1980. Dr. Brent Brandon, a Board-certified radiologist and NIOSH certified "B" reader interpreted the film as evidencing simple pneumoconiosis, Type q, profusion 1/0 in the upper zones of both the Claimant's lungs (DX 30). Based upon the foregoing the Claimant is found to have demonstrated the existence of simple pneumoconiosis by X-ray as of 9 February 1977.

b. *The Ventilatory Studies*

The Claimant underwent ventilatory studies on 13 April 1977 and 11 March 1980 (DX 8,9). The Claimant's height is 69". In the first study the Claimant demonstrated an FEV_1 of 2.9 and MVV of 49. It was unclear whether the Claimant's low MVV was attributable to muscle weakness or poor cooperation, and the Claimant's cooperation and comprehension were not noted in the report. Hence, this study is entitled to no weight. In the second study the Claimant demonstrated a FEV_1 of 2.8 and MVV of 58. His FEV_1 was noted to be normal and his MVV moderately reduced. Cooperation and comprehension of the Claimant were stated to be good.

c. *The Arterial Blood Gas Studies*

The Claimant's first arterial blood gas study of record was undertaken on 11 March 1980. He demonstrated a

pCO_2 level of 29 and a pO_2 of 101.7 while resting [and] breathing room air (DX 12). His second study was undertaken on 1 July 1980 also while resting and breathing room air. He demonstrated a pCO_2 level of 29 and pO_2 level of 65 (*ibid.*). Dr. Richard S. Buddington felt that the Claimant demonstrasted a class III of moderate impairment (*ibid.*). The latter study was validated on 1 July 1980 by Dr. Sarah B. Long (DX 13).

d. *The Physicians' Reports*

The Claimant was seen by Dr. Stephen M. Hessl on 29 January, 9 February and 20 April 1977 (DX 10). Dr. Hessl diagnosed the Claimant as suffering from pneumoconiosis secondary to inhalation of fibrogenic dust, and atherscleroticheart disease. Based upon the Claimant's history Dr. Hessl felt that the Claimant's limiting factor was his dyspnea and that he had a moderate to severe functional impairment (class II New York Health Assn.) In an 11 March 1980 examination Dr. Hessl diagnosed the Claimant as having atherscleroticheart disease, post myocardial infraction [*sic*] and coronary bypass as well as angina pectoris. Additionally, the Claimant was thought to have chronic bronchitis and coal workers' pneumoconiosis (AMA class II respiratory and/or cardiac impairment (DX 11; see also CX 3).

Dr. Sarah B. Long revi[e]wed the Claimant's medical evidence on 7 April 1981 (DX 18). Dr. Long was of the opinion that the Claimant was disabled from his heart disease rather than black lung disease and noted the Claimant had coronary artery bypass surgery in both 1975 and 1979. Dr. Long did not feel that the Claimant's five years of coal mine employment was sufficient to account for his respiratory impairment.

e. *The Claimant's Testimony*

The Claimant testified in his deposition that he retired in 1976 at the age of 54 years. He became short of breath

because of blockage of the arteries of his heart. After he left work to undergo coronary bypass surgery he never returned (Dep. T 30). He was hospitalized with pneumonia in February of 1983 (Dep. T 32). Currently he uses oxygen for three hours per day (Dep T 24).

CONCLUSIONS OF LAW

I

The Claimant's deposition is received into evidence.

II

As the Claimant has less than ten years of coal mine employment his claim must be examined under 20 CFR Part 410 Subpart D (*Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981)). To meet the requirements of this subpart the Claimant "must affirmatively prove the existence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment and that pneumoconiosis is the primary cause of his total disability" (*Ovies v. Director*, OWCP, 3 BLR 1-609 (1981)).

The finding of the existence of pneumoconiosis may be predicated upon a qualifying X-ray or biopsy report (20 CFR 410.414(2)) [*sic*]. As the Claimant has been found to have demonstrated X-ray evidence of pneumoconiosis, i.e. simple pneumoconiosis, profusion 1/0 or greater, he has satisfied this portion of his burden of proof.

Whether the Claimant's pneumoconiosis arose out of his coal mine employment is less clear. The Claimant's dust exposure while he worked as a[n] automobile mechanic, which often involved relining brakes, and as a lapmaster operator and lead man which involved pouring abrasive dust into a lapmaster machine may well have substantially contributed to his condition. This is especially true because he only mined coal for 5 years while he spent

over twenty years in the other occupations. There is no medical opinion in which it is stated to a reasonable degree of medical certainty that the Claimant's pneum[o]coniosis is from his coal dust inhalation. Likewise, there is no opinion stating with certainty that his pneumoconiosis is not from coal mining. In light of the fact that the Claimant's dust exposure as a miner was most likely much more intense than in his other employment, he is given the benefit of the doubt.

The claim must fail, however, as there is not substantial proof indicating that the Claimant's total disability is due to coal workers' pneumoconiosis. There is no indication in the record of the impact of the Claimant's tuberculosis on his health. The Claimant has not demonstrated total disability based upon his ventilatory study because a miner 69″ in height must demonstrate FEV_1 and MVV values not exceeding 1.8 and 64, respectively (20 CFR Part 410.426(b)). Also the Claimant has not demonstrated total disability based upon his arterial blood gas studies because a miner with a pCO_2 level of 29 must demonstrate a corresponding pO_2 level not exceeding 65 (20 CFR Part 410 Subpart D Appendix). Likewise, no physician's report in the record indicates that the Claimant is totally and permanently disabled from pneumoconiosis. The Claimant is most likely disabled from his heart condition, as both his testimony and the opinions of the physicians, especially that of Dr. Long, indicate.

III

As the claim is denied herein, the Claimant's counsel is not entitled to an award of attorney's fees. Nor may the Claimant be charged directly for representation services rendered in pursuit of this claim (30 USC 922(a)).

ORDER

Accordingly, on the Findings of Facts, Conclusions of Law and the entire record, the Claimant's demand for benefits under the Act is hereby denied.

/s/ V. M. McElroy
V.M. McElroy
Administrative Law Judge

Washington, D.C.
VMM:bdw

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036.

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR

BRB No. 83-2530 BLA
OWCP No. 235-44-0518

BILL COLLEY, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

[Filed Sept. 19, 1986]

DECISION AND ORDER

Appeal of the Decision and Order – Rejection of Claim of V. M. McElroy, Administrative Law Judge, United States Department of Labor.

Locke E. Bowman III (Mayer, Brown & Platt), Chicago, Illinois, for the claimant.

Before: SMITH and DOLDER, Administrative Appeals Judges, and MURRAY, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order – Rejection of Claim (81-BLA-3004) of Administrative Law Judge V. M. McElroy issued on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901-945.

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*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. §921(b)(5) (West 1986).

The administrative law judge found that claimant had only 9.5 years of coal mine employment and, accordingly, considered the claim under 20 C.F.R. Part 410. After noting that it was "questionable" whether claimant had pneumoconiosis and that the evidence of a totally disabling respiratory or pulmonary impairment was "equivocal," the administrative law judge found that claimant had failed to show that his respiratory or pulmonary impairment was causally related to his prior coal mine employment. *See* 20 C.F.R. §410.416(b).

Claimant appeals, contending that the administrative law judge erred by finding less than 10 years of coal mine employment. Claimant further contends that the administrative law judge should have considered the claim under 20 C.F.R. § 410.490, citing *Halon v Director, OWCP,* 713 F.2d 21, 5 BLR 2-115 (1983), *reinstating on rehearing* 713 F.2d 30, 5 BLR 2-20 (3d Cir. 1982). Claimant also argues that the administrative law judge erred by considering the claim under 20 C.F.R. Part 410 rather than under 20 C.F.R. Part 718. Finally, claimant contends that the administrative law judge erred by failing to grant benefits pursuant to 20 C.F.R. § 410.414(c).[1]

The Board's scope of review is limited. If the findings of fact are support[ed] by substantial evidence, are rational, and are consistent with applicable law, they are binding

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[1] In light of our disposition of this case, we decline to address the following additional arguments advanced by claimant: the administrative law judge failed to find that the medical evidence established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. § 727.203(a)(1), (3), and (4); the administrative law judge failed to find no rebuttal of the interim presumption pursuant to 20 C.F.R. § 727.203(b); and the administrative law judge improperly permitted the issue of the existence of pneumoconiosis to be raised at the hearing, *see* 20 C.F.R. § 725.463.

upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

We affirm the administrative law judge's rejection of the testimony of claimant's half-brother, Mr. U. G. Rowe. Although Mr. Rowe's testimony and affidavits, if found credible, could support a finding that claimant worked 3 additional years from 1942-44 in 3 different Kentucky coal mines that did not report claimant's wages to the Social Security Administration, we cannot say that the administrative law judge erred by rejecting them due to inconsistencies. While lay testimony may provide substantial evidence for a finding of length of coal mine employment, *see Kephart v. Director, OWCP*, 8 BLR 1-185 (1985), an administrative law judge is not required to accept such testimony even if it is uncontradicted. *See Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). The administrative law judge properly made the credibility determination regarding which of the inconsistent and contradictory statements he found most credible. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Nor did the administrative law judge err by rejecting Mr. Rowe's testimony regarding additional coal mine employment alleged to have occurred in 1948-50, as the Social Security records may be credited over Mr. Rowe's "hazy recollection." *See Tackett, supra.* Accordingly, we affirm the administrative law judge's finding of 9.5 years of coal mine employment.

We reject claimant's contention that the administrative law judge should have considered the claim under 20 C.F.R. Part 718 rather than 20 C.F.R. Part 410. Claimant has submitted no arguments that were not considered and rejected by the Board in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981).

We also reject claimant's contention that the administrative law judge should have considered this claim under the provisions of 20 C.F.R. § 410.490, as the instant case arises in the 4th Circuit. *See Stanton v. Director, OWCP*, 8 BLR 1-438 (1986).

Finally, because substantial evidence exists in the record supporting the administrative law judge's finding that claimant failed to establish that his respiratory or pulmonary condition is causally related to his prior coal mine employment, it is hereby affirmed. *O'Keeffe, supra.*

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ ROY P. SMITH
Roy P. Smith
Administrative Appeals Judge

/s/ NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

/s/ FREEMAN C. MURRAY
Freeman C. Murray
Administrative Law Judge

Dated this 19th day
of September 1986

APPENDIX E

UNITED STATES DEPARTMENT OF LABOR

Case No. 81-BLA-3004
OWCP No. 235-44-0518

BILL COLLEY, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

DATE ISSUED: 30 SEP 1983

Pamela A. Hunter, Esquire for the Claimant
Daniel A. Caldwell, Esquire For the Party-in-Interest
Before: V.M. McElroy Administrative Law Judge

DECISION AND ORDER—REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing[1] was held in Gastonia, North Carolina, on December 14, 1982, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 of the Code of Federal Regulations. New Parts 725 and 727 were added to Title 20 on August 18, 1978, and were published in the Federal Register on that date (43 F.R. 36772 *et seq.*).

Findings of Fact and Conclusions of Law

Date of Filing

The claimant filed his claim for benefits under the Act on September 18, 1974. (D.l). The claim is timely filed (D.46).

Dependents

Subject to further verification by the Party-in-Interest Claimant appears to have three dependents for purposes of augmentation of benefits (D.46): (1) his current wife (D.1); and his children, (2) Barbara Ellen, born December 5, 1959 (D.1, 10), and (3) Lisa Kay, born October 21, 1968 (D.1, 10).

Responsible Operator

Not having alleged anyone to be the responsible operator in this case, the Director, Office of Workers' Compensation Programs, will provide for the payment of any benefits which may be due the Claimant.

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[1] The transcript of hearing will be referenced as "Tr." Director's exhibits are abbreviated "D." Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. The record closed on February 14, 1983 (Tr. 37, 40).

Coal Miner

Claimant's Social Security records, covering employment from January 1945 through December 1962 (D.2), establish approximately 7.5 years of miner work ending in 1959 (D.42; Tr. 33).[2]

Dispute centers around any non-union Kentucky miner work, unreported to the Social Security Administration[3], in which Claimant may have engaged. Providing most of the evidence on this score is 26-year miner (Tr. 26) U.G. Rowe, age 60 (Tr. 10), and Claimant's half brother (Tr. 10, 29). Mr. Rowe testified that he worked with Claimant, who was then 14 or 15, in various Kentucky coal mines from 1942-1944, a period of three years (Tr. 10-12, 25). These mines included Blankenship, Chaney and Ratcliff Coal Companies. At age 14, Claimant, who was born May 29, 1929 (D.1), would have begun his mining employment sometime in 1943, seemingly a one-year discrepancy. But this difference may be attributable to difficulty in recalling events taking place some 40 years ago. However, he relates no Kentucky employment in his 1974 statement (D.6), explaining he thought only West Virginia mining experience was requested (Tr. 23-24). Yet, in 1979, he variously asserted that Claimant worked two years in a non-union Kentucky mine before age 15 (D.4), presumably at age 13

[2] This is a generous finding in light of quarterly credit given for each of the following: $8.33 earned in 1949's second quarter, $25.00 in 1954's third quarter, and $3.33 in 1956's fourth quarter. Added together, earnings for these three quarters are less than $50.00, the minimum previously utilized by the Social Security Administration for allowing one quarter's credit. The $30.00 earned in 1958's first quarter is subsumed by earnings during the same time for Truax Coal Company.

[3] As to miner work performed in West Virginia and all employment reported to the Social Security Administration, I credit Social Security records over Mr. Rowe's hazy recollection (Tr. 14-16; D.4-6, 36).

in 1941; and that Claimant performed mining duties in 1943 and 1944 for Blankenship Coal Company, a 2-year history of Kentucky coal mine employment (D.5). Mr. Rowe's construction of events displays too many inconsistencies to be deemed credible. Nevertheless, Mr. James Chaney (D.7) attested that Claimant worked in Chaney Coal Company for 2 years (May 1945-May 1947). Assuming this work was steady and that Mr. Chaney had a sufficient personal knowledge, as in the past corroborated by Mr. Rowe (Tr. 12), Claimant's qualifing miner work would not exceed a total of 9.5 years.

[4] Pneumoconiosis and Total Disability

Since Claimant did not establish at least 10 years of miner work, this claim is governed by Part 410, not Part 727, of the regulations. All relevant evidence will be considered to determine whether Claimant is totally disabled by coal workers' pneumoconiosis.

I. Evidence

An April 1975 X-ray was read and reread by a "B" reader as negative for pneumoconiosis (D.19, 21). A board-certified radiologist (D.44) then interpreted a November 1977 film as showing 1/0 pneumoconiosis (D.20). The superior credentials of the rereader and the great length of time that has elapsed since Claimant left the mines, makes questionable the 1977 finding of minimal pneumoconiosis.

[4] (D. 13-15) Presence of pnuemoconiosis was not a "new issue" raised for the first time at hearing (Tr. 6-7). Although it was not originally shown on the prehearing list of contested issues (D.46), the subject was raised in writing at the Deputy Commissioner level (D.22, 25, 28). Therefore, the issue is properly resolved by the undersigned. 20 C.F.R. § 725.463(a) (1982).

None of the three ventilatory tests (D.13-15) yielded scores indicative of an impairment under § 410.426(b) for a 70″ miner (FEV ≤ 1.8, MVV ≤ 65). A 1975 study revealed a qualifying FEV^1 (.765), but the MVV (156) was far in excess of table values even with poor cooperation (D.13). The MVV (65) in a (2.24) 1976 study was qualifying, but the FEV^1 (2.24) was not (D.14). The absence of spirometric tracings and a stat event [*sic*] of the miner's cooperation and comprehension also make the study nonconforming under § 410.430. Finally, both the FEV^1 (2.79) and the MVV (76) are non-qualifying for the most recent test administered in 1977 (D.15). On balance, scores achieved do not demonstrate that Claimant's pneumoconiosis is totally disabling.

A validated blood-gas study (D.44), the only one of record (D.16), is also unavailing. Claimant achieved before exercise PCO_2 of 33 and a PO_2 of 67. A qualifying PO_2 would have been 62 or less. After exercise, Claimant's April 1975 PCO_2 was 31, with a PO_2 of 86. To qualify as an impairmant under Part 410's Appendix, Claimant's PO_2 must have been 64 or less.

Claimant, age 54 at the time of hearing (Tr. 10), left coal mining because of a co-worker's death (D.1). Severe breathlessness sufaced about 5 years before his filing for benefits (D.1). Mr. Rowe testified to Claimant's breathing problems as of 1974 (Tr. 18). Since 1975, according to Mr. Rowe, Claimant has been unable to work and certainly could not perform his prior arduous coal mining (Tr. 16-17, 19-20). He does not know why Claimant cannot work, but referred to his use of a cane in 1976 and an October 1978 stroke (Tr. 19). Claimant has smoked about one-half pack of cigarettes per day since 1960 (Tr. 181).

Finally, and most telling, are doctors opinions. In April 1975, Dr. Kellum physically examined Claimant and diagnosed possible chronic bronchitis with no probable restrictive disease (D.16). Using the non-qualifying blood-gas

results, he concluded that his respiratory or pulmonary condition was not related to coal dust exposure. Dr. Bates, relying solely on a nonqualifying ventilatory study, found Claimant to have a moderate obstructive impairment (D.14). Based on physical examination and a nonqualifying ventilatory study, Dr. Sutoris detected moderately severe chronic obstructive pulmonary disease in 1976 (D.17). He did not express an opinion concerning its relationship, if any, to coal dust exposure. Dr. Sutoris did certify Claimant's total disability due to hypertensive cardiovascular disease and arthritis (D.3). In 1978, Dr. Banner, following a physical examination of Claimant, diagnosed hypertension, chronic bronchitis, and coal workers' pneumoconiosis (D.18). The doctor repeated Claimant's contention that exercise beyond one block cannot be tolerated. His comment to a 1977 ventilatory study was that claimant had a mild restrictive disease. And last, Dr. Burki, who reviewed most of the medical data in the case but did not physically examine Claimant, opined that Claimant's 7-plus years as a miner did not cause his ventilatory impairment.

II Conclusions

It is questionable whether Claimant has minimal pneumoconiosis by X-ray. Medical evidence of a totally disabling respiratory or pulmonary impairment is also equivocal. Blood-gas and ventilatory studies produced non-qualifying scores. Doctors' comments to ventilatory studies indicate at the least, a mild impairment that could prevent Claimant from undertaking his prior strenuous coal mine employment. All other physicians would seem to agree.

However, Claimant has not shown that any such disabling respiratory or pulmonary condition was caused by his exposure to coal mine dust. Only one examining physi-

cian of record, Dr. Banner, linked Claimant's respiratory and pulmonary conditions to coal mine employment. Curiously, Dr. Sutoris did not answer the question, although he identified disabling conditions that need not be connected with occupational exposures. Examining physican Dr. Kellum, keying in on the blood-gas study, determined that Claimant's conditions were not attributable to coal mine employment; and Dr. Burki concurred.

Given the record in this case, I find that Claimant has not met his burden of establishing every element of his claim. Claimant has not shown that his respiratory or pulmonary condition is causally related to his prior coal mine employment.

Attorney Fee

The award of an attorney fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of Bill Colley for benefits under the Act is denied.

/s/ V. M. McELROY
V.M. McElroy
Administrative Law Judge

Washington, D.C.
VMM/ch

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1091
No. 86-3153

CHARLIE BROYLES, ET AL, PETITIONERS,

v.

DIRECTOR, ETC., ET AL, RESPONDENTS.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

[Filed Sept. 30, 1987]

ORDER

The respondent's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Britt, Chief United States District Court Judge, sitting by designation and Judge MacKenzie, Chief United States District Court Judge, sitting by designation.

For the Court,

/s/ JOHN M. GREACEN
Clerk

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